**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| **STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,** | ) | |
| **Plaintiff,** | ) | |
| **vs.** | ) | **05-CV-0329 TCK-SAJ** |
| **TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,** | ) | |
| **Defendants.** | ) | |
| **TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,** | ) | |
| **Third Party Plaintiffs,** | ) | |
| **vs.** | ) | |
| **City of Tahlequah, *et al.*,** | ) | |
| **Third Party Defendants** | ) | |

**DEFENDANTS/THIRD PARTY PLAINTIFFS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS/THIRD PARTY PLAINTIFFS' OPPOSED MOTION FOR LEAVE TO FILE AMENDED THIRD PARTY COMPLAINT**

Defendants/Third Party Plaintiffs, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc., ("Third Party Plaintiffs") hereby submit their Reply to Plaintiff's Response in Opposition to Defendants/Third Party Plaintiffs' Opposed Motion for Leave to File Amended Third Party Complaint pursuant to Fed. R. Civ. P. 15(a). (DKT # 816) ["Motion for Leave"].[1]

**SUMMARY OF ARGUMENT**

The purposes for the Third Party Plaintiffs' proposed Amended Third Party Complaint are clearly permissible, appropriate and set forth in detail in their Motion for Leave. Nonetheless, Plaintiffs once again argue that Third Party Plaintiffs cannot maintain their third party claims as a matter of law, and therefore, any amendment to such claims would be futile. Plaintiffs' arguments fail as either being unsupported by the law or because they are based upon a flawed reading of the proposed Amended Third Party Complaint.

For the most part, Plaintiffs' opposition to the Motion for Leave to amend and the proposed Amended Third Party Complaint repeats their arguments in opposition to the claims asserted in the original Third Party Complaint set forth in their Motion to Sever and Stay and/or Strike or Dismiss the Claims Asserted in the Third Party Complaints and Integrated Brief in Support (hereinafter "Motion to Strike") (DKT #247). These arguments were adequately addressed and disposed of in the Third Party Plaintiffs'

[1] By filing their Reply to Plaintiffs' Response to their Motion for Leave and arguing same before the Honorable Magistrate Judge Joyner, the Third Party Plaintiffs expressly do not waive any objection that they may have to any Order entered by the Federal Magistrate dismissing their third party claims in contravention to Article III of the United States Constitution. *See* 28 U.S.C. § 636(b)(1)(A); *TPO, Inc. v. McMillen*, 460 F.2d 348, 359-60 (7th Cir. 1972).

Response to the Motion to Strike (DKT # 495), and therefore, in the interest of brevity, Third Party Plaintiffs incorporate their prior response as though fully set forth herein.

As stated in their Response to the Motion to Strike, Third Party Plaintiffs' claims are the natural companion to Plaintiffs' claims, and arise as a function of the scale of the litigation that the Plaintiffs established through their First Amended Complaint, *i.e.*, the alleged injury to the "biota, lands, waters and sediments" in the 1,000,000 plus acre Illinois River Watershed ("IRW"). Because Plaintiffs have sued only members of the poultry industry seeking to hold them jointly and severally liable for the entirety of this alleged "common injury," federal and Oklahoma law recognizes the rights of the accused jointly and severally liable defendants to implead third parties "who may be liable to the third-party plaintiff[s] for all or part of the plaintiffs' claim…." Fed R. Civ. P. 14(a), and Okla. Stat. tit. 12, § 832(A). This right to join third parties can take the form of contribution actions, as well as additional direct claims for liability.

This is the exact circumstance that has arisen here. Under the scenario alleged by Plaintiffs to give rise to the Third Party Plaintiffs' are joint and several liability, the Third Party Plaintiffs have set forth claims for contribution, either pursuant to their unqualified right to do so provided by Oklahoma's Contribution Among Tortfeasors Act, Okla. Stat. tit. 12, § 832, or pursuant to the statutory right of contribution provided in CERCLA, 42 U.S.C. 9613(f). Third Party Plaintiffs have also determined that the circumstances alleged by Plaintiffs in their First Amended Complaint also support claims for the direct liability of the Third Party Defendants for prospective injunctive relief under the Citizen Suit Provisions of RCRA, 42 U.S.C. § 6972, and for unjust enrichment under Oklahoma common-law.

Plaintiffs are plainly incorrect in their analyses of the Third Party Plaintiffs' RCRA and unjust enrichment claims as set forth in detail in the Response to the Motion to Strike. (Resp. Mot. Strike at pp. 5-8). As to the Third Party Plaintiffs' contribution claim under CERCLA § 113(f), Third Party Plaintiffs' Response to the Motion to Strike adequately pointed out for the Court that although Plaintiffs contend that the right to contribution "is in doubt," the authority upon which they relied predated the codification of the statutory right of contribution, and therefore, it has no applicability to the case at hand.

Finally, and most disturbingly, the balance of Plaintiffs' futility argument hinges upon their assertion that the Court should dismiss the Third Party Plaintiffs' contribution claims at this juncture by assuming that the jury will reach a verdict finding that the Third Party Plaintiffs' alleged tortuous conduct was intentional. Plaintiffs' argument that they can preclude the Third Party Plaintiffs from exercising their right to seek contribution from potentially responsible third parties merely by pleading intentional conduct in the First Amended Complaint is both a play on words and directly rebutted by the express language of the statute giving rise to the cause of action, Okla. Stat. tit. 12, § 832.

Furthermore, to the extent the proposed amendment is offered for the additional purpose of clarifying allegations, stream lining, correcting the proper parties or to correct potential deficiencies in the original Third Party Complaint, the federal courts have expressed a strong inclination to allow the amendment so the claims can be tested on the merits.

## ARGUMENT AND AUTHORITY

### A. Legal Standard

Under Federal Rule of Civil Procedure 15(a), leave to amend should be freely granted when there is no showing of undue delay, bad faith or dilatory motive on the part of the movant, and more importantly, if the "underlying facts or circumstances…may be the subject of relief," the trial court should give the party an opportunity to test his claim. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). As demonstrated in the Motion for Leave, the amendments sought are not motivated by any malevolent or dilatory objective. Third Party Plaintiffs seek these amendments in furtherance of their efforts to pursue and preserve their rights against other potentially responsible parties as authorized by Fed. R. Civ. P. 14(a). Rule 14 permits any defendant to assert claims against any third party who is not a party to the action "who *may* be liable" to the defendant "for all or part" of the plaintiff's claims against that defendant. *See* Fed. R. Civ. P. 14(a) (emphasis added).

Plaintiffs argue that Third Party Plaintiffs' Motion for Leave should be denied because the claims within the proposed Amended Third Party Complaint are futile relying upon *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997). In *Bauchman*, the Tenth Circuit held that futility is determined by whether the amendment would survive summary judgment. *See id.* at 562. Because at this procedural point in the case Plaintiffs have filed a Motion to Dismiss, the Court's determination as to the futility of the claims within the proposed Amended Third Party Complaint is the functional equivalent of determining whether it should be dismissed for failure to state a claim. *See Gohier v. Enright,* 186 F. 3d 1216, 1218 (10th Cir. 1999). The legal standard for dismissing a complaint based upon failure to state a claim pursuant to Fed. R. Civ. P.

12(b)(6) requires the Court to assume that all material facts contained within the proposed Amended Third Party Complaint are true. *See Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 633 (1999). The Court must also indulge all inferences contained within the proposed Amended Third Party Complaint in favor of the Third Party Plaintiffs. *See Colins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). For the Court to dismiss the Third Party Complaint or to find the proposed amendment to be futile, it must determine "beyond doubt that the [Third Party Plaintiffs] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Given the Tenth Circuit's disfavor for granting such motions to dismiss, *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004), this is a burden Plaintiffs have failed to sustain.

**B. The Court Should Grant Third Party Plaintiffs' Motion for Leave to Amend Because Third Party Plaintiffs' Claims for Contribution under State Law Are Not Futile.[2]**

Plaintiffs contend that by virtue of the mere mention or allegation that the Third Party Plaintiffs' conduct was intentional, they can completely bar the Third Party Plaintiffs' statutory right to seek contribution as a matter of law at this juncture. This logic and attempt to hamstring the Third Party Plaintiffs simply through wordsmithing is in direct contravention to Oklahoma's Contribution Among Tortfeasor's Act, Okla. Stat. tit. 12, § 832.

First, the plain language of the Act does not support the legal conclusion the Plaintiffs desire from the Court. The Act provides the right of contribution "when two or

[2] As previously stated, Third Party Plaintiffs incorporate herein their arguments and authorities set forth in the Response to the Motion to Strike, pursuant to Fed. R. Civ. P. 10(c).

more persons become jointly or severally liable in tort for the same injury…" *Id.* at §832(A). This right, although inchoate, may be pursued by the defendants against third parties in the original action recognizing that at that time, judgment has not yet been recovered against any of them. *See Barringer v. Baptist Healthcare of Oklahoma*, 22 P.3d 695, 698 (Okla. 2001). This right to contribution amongst tortfeasors accrues at the time plaintiff's right to recover arises. *See Lambert v. Inryco, Inc.*, 569 F.Supp. 908 (D.Okla. 1980); *Niece v. Sears, Roebuck & Co.*, 293 F.Supp. 792, 794 (D.Okla. 1968). In simple terms, the right to contribution is not operative until the verdict is rendered. Hence, in this case, the right of contribution will not arise unless a jury were to find the Third Party Plaintiffs jointly and severally liable, as Plaintiffs claim.

Plaintiffs' futility argument is founded upon the exception set forth in the Act, which provides that "[t]here is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury…" *Id.* at § 832(C). Just as the right to contribution does not arise unless a verdict on the Plaintiffs' claims has been received, the exception to the right of contribution does not arise unless a verdict is received finding that the Third Party Plaintiffs' conduct was intentional. By expressly permitting defendants who have been accused of being jointly and severally liable to the plaintiff to initiate and pursue their inchoate contribution claims in the original action, the Oklahoma courts allow the action to proceed recognizing that the right of contribution will only arise if the jury finds joint and several liability. By logical extension, if the right is established by such jury finding, it will only be barred if the jury further finds the joint tortfeasors' conduct to be intentional.

The hypocrisy of Plaintiffs' argument is inescapable. Plaintiffs contend that the case should proceed under their allegation that the Third Party Plaintiffs are jointly and severally liable, and that the Third Party Plaintiffs' contribution claims should be precluded based upon an allegation of intentional conduct; yet, they refuse to acknowledge that their right to recover, the Third Party Plaintiffs' right to contribution, nor the exception in § 832(C) will arise unless the jury makes certain findings. Under the legal standards articulated in the preceding section herein, the Court must accept Third Party Plaintiffs' well-plead allegations, and cannot presume at this juncture what the proof will be or what the jury will conclude. Accordingly, to the extent Plaintiffs have adequately stated a claim for joint and several liability in their First Amended Complaint, the necessary corollary is that the Third Party Plaintiffs have likewise stated a claim for contribution under § 832 in their original and proposed Amended Third Party Complaint.

**C. The Court Should Grant Third Party Plaintiffs' Motion for Leave to Amend Because Third Party Plaintiffs' Claims for Contribution for Costs of Investigation and/or Remediation Under Plaintiffs' Negligence *Per Se* Theory, Unjust Enrichment under State Law, Prospective Injunctive Relief Under RCRA, and Contribution under CERCLA are not Futile.**

Third Party Plaintiffs hereby incorporate their arguments and authorities set forth in their Response to the Motion to Strike. This Response to the Motion to Strike clearly establishes that Plaintiffs' opposition to their third party claims is not supported by analogous authority, and is, in part, founded upon an erroneous reading of the original and proposed Amended Third Party Complaints.

Further, Plaintiffs argue that the unjust enrichment claims asserted by Third Party Plaintiffs in the proposed amendments to the Third Party Complaint are "merely variations of contribution claims." In making this argument, Plaintiffs' reliance upon the

holding in *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488 (S.D. Ohio 1991) is in error.

In *Pretty Products*, the Environmental Protection Agency ("EPA") brought an action against Pretty Products pursuant to CERCLA seeking recovery of costs incurred in a clean-up and future costs for the release of hazardous substances at the Coshocton City Landfill Site. *See id*. at 1492. Prior to filing suit against Pretty Products, the EPA had entered settlement agreements for the clean up of the site with eight other identified Potentially Responsible Parties ("PRPs"). In turn, *Pretty Products* brought third party claims for contribution under CERCLA and other common law theories including unjust enrichment against one of the other PRPs who had settled its liability. *See id*. The District Court held that although CERCLA provides for joint and several liability, it prohibits claims for contribution under 42 U.S.C. § 9613(f) when a PRP has settled with the federal or state government to the extent the matters are addressed in the settlement. *See id.* at 1495. The court's conclusion that because contribution recovery against the settling PRP was precluded under CERCLA, it was also precluded under state common-law theories is clearly distinguishable from the case at bar. *See Pretty Products*, 780 F. Supp at 1496. Here, none of the Third Party Defendants have settled their liability with the Plaintiffs; hence the contribution bar of CERCLA § 113(f)(2) and Okla. Stat. tit. 12, § 832(D) are not implicated.

Third Party Plaintiffs' unjust enrichment claim is a direct claim against the Third Party Defendants to the extent Third Party Plaintiffs are spending, or are required to spend money to investigate, sample, monitor, remediate or otherwise incur costs in response to Plaintiffs' claims for the alleged injury to the IRW, where such injuries were

the result of actions by the Third Party Defendants. Because any such payments, if ordered, would constitute a benefit conferred upon the Third Party Defendants by Third Party Plaintiffs, which the Third Party Defendants should rightfully bear, those payments create an injustice which the cause of action for unjust enrichment was developed to redress. *See Moore v. Texaco*, Inc. 244 F.3d 1229, 1233 (10th Cir. 2001). Furthermore, it is axiomatic that a single set of facts can support more than one theory of recovery; therefore, contrary to Plaintiffs' argument, the Third Party Plaintiffs' unjust enrichment claim is not futile, and their amendment to clarify such claim should be permitted.

**CONCLUSION**

Third Party Plaintiffs have clearly met their burden to show that their proposed Amended Third Party Complaint is authorized under Fed. R. Civ. P. 15(a). In contrast, Plaintiffs have failed to carry their steep burden of demonstrating that the proposed amendment to the Third Party Complaint would be futile because Plaintiffs cannot prove, as a matter of law, that the proposed Amendment fails to state a right to relief. Therefore, Third Party Plaintiffs' respectfully suggest that their Motion for Leave to file their Amended Third Party Complaint should be granted.

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